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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 235

SANGAMON VALLEY TELEVISION CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION, SIGNAL HILL TELECASTING CORPORATION, WMAY-TV INCORPORATED, AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., and PLAINS TELEVISION CORPORATION, *Respondents.*

BRIEF OF INTERVENOR SIGNAL HILL TELECASTING CORPORATION IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

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OPINIONS BELOW

The per curiam opinion of the Court of Appeals is reported at 255 F. 2d 191. The earlier opinion of the Court of Appeals in the closely related case of *WIRL Television Company* v. *United States* is reported at 253 F. 2d 863.

QUESTION PRESENTED

Did the Court below err in holding that the Federal Communications Commission had not acted in violation of Section 307(b) of the Communications Act of 1934, but had "weighed the various factors involved and reached a reasoned decision within its competence," when it determined (1) that the public interest in obtaining a maximum number of television stations would be better served by giving Springfield, Illinois, four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels, and (2) that the VHF channel thus deleted from Springfield should be assigned to Terre Haute, Indiana, which already had one VHF commercial channel and to St. Louis, Missouri, which already had three VHF commercial channels and one educational VHF channel?

STATUTE INVOLVED

Section 307(b) of the Communications Act is correctly quoted by petitioner at page 2 of its petition.

COUNTER-STATEMENT OF THE CASE

This case involves a rule-making order of the Federal Communications Commission issued March 1, 1957. The order accomplished the "deintermixture" of Springfield, Illinois, by allocating to that city four technically equal UHF channels in lieu of one technically superior VHF channel and two UHF channels. On the same day, similar orders were issued deintermixing a number of other areas (*infra*, f.n. 3).

Background of the Deintermixture Orders

The background for these orders was succinctly stated by the Court below, in its decision approving the Peoria order, as follows:[1]

> The separate rule-making proceedings which led to the removal of Channel 8 from Peoria [and Channel 2 from Springfield] were held in response to a nationwide problem concerning UHF television in general . . . In 1952 UHF was believed to have a healthy future and many communities were "intermixed", that is, allotted both UHF and VHF channels, so as to encourage the development of UHF television. It was thought that UHF and VHF could compete effectively with each other. As time passed, however, UHF did not progress as rapidly as had been hoped, and in many "intermixed" areas UHF televisers were in straits, because the audiences, networks and advertisers preferred the superior VHF outlets.
>
> In response to this problem the Commission in 1955 began proceedings to consider the feasibility of "deintermixture", *i.e.*, making all channels in any one area either VHF or UHF, but not an intermixture of both. . . .
>
> On June 26, 1956, the Commission proposed to explore the possibilities of shifting all or most television broadcasting to the UHF band. The Commission added:
>
> > "Since some years would be required in any event for the full implementation of an all-UHF system, the Commission believes that steps should be taken in the meantime to improve the opportunities for effective competition among a greater number of stations.

[1] *WIRL Television Co.* v. *United States*, 253 F. 2d 863, 865.

> As already indicated, a basic choice in many markets at this time lies between the elimination of VHF channel assignments to create improved opportunities for UHF broadcasting and, alternatively, the assignment of additional local VHF channels."

Consequently, an "interim" proceeding was begun, involving 13 communities, in nine of which (including Peoria [and Springfield]) it was proposed to delete the existing VHF allocations. . . .[2]

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[2] The criteria to govern these interim proceedings were set forth in detail in the Commission's June 26, 1956 order (21 Fed. Reg. 4958, 13 Pike & Fischer RR 1571).

These were "in markets with one or more commercial VHF assignments, the merits of proposals to eliminate a VHF commercial assignment would depend to a large extent on such factors as:

"1. Whether significant numbers of people would lack service as a result of the elimination of the VHF channel.
"2. Whether one or more UHF stations are operating in the area.
"3. Whether a reasonably high proportion of the sets in use can receive UHF signals.
"4. Whether the terrain is reasonably favorable for UHF coverage.
"5. Whether, taking into account all the local circumstances, the elimination of a VHF channel would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations.

"The desirability of assigning a first VHF channel or of adding an additional VHF channel would depend principally upon:

"1. Whether it is possible to locate the new transmitter so as to meet minimum transmitter spacings.
"2. Whether, in cases where it is necessary to move the channel from another city, there is greater need for the channel in the area to which it is proposed to be assigned.
"3. Whether the addition of a new VHF assignment would be consistent with the objective of improving the opportunities for effective competition among a greater number of stations."

The Springfield Order

One of the thirteen communities thus selected by the Commission for rule-making proceedings, to determine whether deintermixture would meet the criteria of the June 26, 1957 order, was Springfield, situated in the flat central area of Illinois. In its order, the Commission (Docket No. 11747) proposed to deintermix both Springfield, Illinois and St. Louis, Missouri, by removing Channel 2 from Springfield and substituting two UHF channels (thus making that market all-UHF) and assigning Channel 2 to St. Louis, Missouri (thus adding a fourth commercial VHF channel to a community destined to become all-VHF). Later the Commission announced it would consider the possibility of assigning Channel 2 not only to St. Louis but also to Terre Haute, Indiana, which already had only VHF service. On March 1, 1957, the Commission issued its findings and orders in a number of these rule-making proceedings, among which were orders deintermixing Springfield, Illinois (22 F.C.C. 318), and five other areas.[3]

In each case the Commission made detailed findings that the area in question met the five criteria spelled

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[3] These were Elmira, N. Y. (22 F. C. C. 307), Peoria, Ill. (22 F. C. C. 342), Fresno, Cal. (22 F. C. C. 365), Evansville and Hatfield, Ind. (22 F. C. C. 382), and Albany, Schenectady, Troy, N. Y. (22 F. C. C. 293). Later, the Commission modified the Albany, Schenectady, Troy order so as to accomplish deintermixture by adding another VHF channel rather than deleting the already assigned VHF channels, thus making the market all-VHF rather than all-UHF. (15 Pike & Fischer R. R. 1514a). The rationale of the two orders was, however, the same, namely, the incompatibility in the same market of an intermixture of UHF and VHF operations.

out in the June 26, 1956 order (supra footnote 2). In the Springfield order, it found (R. 689) that "the area is now predominantly UHF, the terrain is satisfactory for UHF propagation, the vast majority of sets in the area are capable of receiving UHF transmissions, and a number of UHF stations are actually engaged in providing service to the public"; that "additional UHF channels . . . are available for assignment to this area, and we are convinced that UHF can provide satisfactory service here"; that "while multiple UHF stations will be able to compete effectively in this market, there is great danger that the addition of a VHF channel would destroy effective competition (R. 689)". For all these reasons, it was concluded that "the deletion of Channel 2 from the Springfield area will enhance the opportunities for more effective competition among a greater number of stations (R. 689)".

The Commission then considered in what communities Channel 2 could best be utilized, upon its deletion from Springfield, and concluded that its assignment to St. Louis, Missouri, and Terre Haute, Indiana, was to be preferred to the alternative proposals for either Salem, Missouri, and Salem, Illinois, or Cape Girardeau, Missouri (R. 689, 690).

In the Court below, on petition for review from the Springfield order, petitioner claimed, as it does here, that the Commission's action violated Section 307(b) of the Communications Act of 1934. Per curiam, that court held that it was "unable to sustain this attack" (255 F. 2d 191), and this petition for certiorari followed.

REASONS FOR DENYING THE WRIT

1. The Court below correctly held that it was not "arbitrary, capricious or otherwise illegal" for the Commission to give Springfield four technically equal UHF channels, all of which could compete against each other, rather than two technically equal UHF channels with a single VHF channel, operations on which would drastically impair service on the UHF channels. On this phase of its decision, the Court's remarks in its Peoria opinion apply equally to Springfield:[4]

> The long range goal of the Commission was to encourage UHF, and removal of potential VHF competition is a rational choice of means to achieve this goal. The short range, or "interim" goal, was to "improve the opportunities for effective competition among a greater number of stations." It was not arbitrary to conclude that the goal would be better approached in Peoria [and Springfield] by allotting it four technically equal UHF channels, rather than one superior VHF channel and two inferior UHF channels. *WIRL Television Company* v. *United States*, supra, 253 F. 2d 863, 866.

2. Nor did the Court err in holding that the Commission's order did not violate Section 307(b). This

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[4] Petitioner complains that the Court below rendered its decision "only two weeks after oral argument," and wrote simply a "one paragraph per curiam opinion." But the Court had only recently considered at some length the related and essentially identical Peoria order, *WIRL Television Company* v. *United States*, supra. Indeed, at the oral argument below, petitioner's Counsel conceded that the Peoria decision, if correct, was controlling. A per curiam opinion was therefore quite appropriate and the petitioner's suggestion in footnote 20 of its petition that the Court of Appeals was confused as to the issues before it is utterly groundless.

section requires the Commission so to distribute radio facilities as to provide a "fair, efficient and equitable distribution of *service*" to the several states and communities. It does not require that there be an identical distribution of *each type of frequency within a service,* regardless of the effect of such distribution upon the actual service that would be made available. Under the far more restrictive language of the statute as then in force, requiring "a fair and equitable allocation of licenses, wave lengths, time for operation and station power to each of the states, . . . within each zone, according to population," this Court held that the Commission had broad discretion in balancing the various types of stations in each state and that "it cannot be said that this demanded equality between states with respect to every *type* of station." *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 281. (Emphasis supplied).[5]

Here, the Commission found that to retain the assignment of a VHF facility in Springfield in addition to the UHF facilities, would result in less,

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[5] In its 1952 Sixth Report and Order, embracing the concept of intermixture of UHF and VHF in the same communities, the Commission, citing *Nelson Brothers*, rejected the contention that it was *required* by law to allocate VHF separately to each community (1 Pike & Fischer RR 91:661):

> *We must, however, reject the contention of the parties that Section 307(b) requires the Commission to treat VHF channels as completely different from UHF channels in making an Assignment Table.* We think it clear that the fair, efficient and equitable distribution required by the Communications Act has reference to over-all distribution within any given radio service and not with respect to every *type* of station within a service. *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, at 281. (Emphasis supplied).

rather than more, actual service. For the Commission had found (and the petitioner did not deny) that the advent of a station on VHF Channel 2 in this community would impair UHF operations. Nothing in Section 307(b) required the Commission to blink these facts and to foist upon Springfield unitary VHF service in place of multiple UHF service.

3. Nor is there basis for petitioner's claim that, in following the mandate of Section 307(b), the Commission could not prefer, for Springfield and the other deintermixed areas, "effective competition among a greater number" of UHF stations rather than VHF monopolies. For the Commission's concern under Section 307(b) properly encompasses, as this Court has stated, "a recognition of local needs for a community radio mouthpiece. The distribution of a second license to a community *in order to secure local competition for originating and broadcasting programs* appears to us to be likewise within the allowable area of discretion." *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 362 (Emphasis supplied). Here, the Commission sought to assure that Springfield and the various other areas being deintermixed not only had television service but "local competition" within that service. This was plainly within that "allowable area of discretion" which this Court found implicit in Section 307(b).

4. Having thus determined to deintermix Springfield by deleting VHF Channel 2 and substituting two more UHF channels, the Commission similarly acted within its "allowable area of discretion" in reassigning the channel for use in St. Louis, Missouri, and Terre Haute, Indiana. These cities had become almost

as predominantly VHF areas as Peoria and Springfield had become UHF areas, and assigning an additional VHF channel to each of these cities was found by the Commission to meet all the criteria set forth in its June 27, 1956 order. (R. 685 et seq.)[6] The enhanced opportunities thus provided for "effective competition among a greater number of stations" in St. Louis and Terre Haute were properly considered by the Commission under the rationale of the *Allentown* case, supra.

5. We submit, therefore, that the Court below properly found that the order appealed from did not violate the mandate of Section 307(b) of the Communications Act, and that the Commission had "weighed the various factors involved and reached a reasoned conclusion within its competence."

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[6] As already noted, other parties had urged that, if deleted from Springfield, channel 2 be assigned to Cape Girardeau, Missouri, or to Salem, Missouri and Salem, Illinois, rather than to St. Louis and Terre Haute. The Commission considered these alternatives at length but concluded it would be more in the public interest to assign the channel to St. Louis and Terre Haute (R. 689, 690). Petitioner does not challenge this decision.

CONCLUSION

For the reasons stated it is submitted that the petition for writ of certiorari should be denied.

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